No. 84-1560

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

PRESS-ENTERPRISE COMPANY,
Petitioner,
VS.
SUPERIOR COURT OF CALIFORNIA,
RIVERSIDE COUNTY,
Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF AMICI CURIAE OF CALIFORNIA NEWS ORGANIZATIONS IN SUPPORT OF PETITIONER

Filed on behalf of The Copley Press, Inc.; The Associated Press; *Los Angeles Times;* National Broadcasting Company, Inc. (NBC); McClatchy Newspapers; *San Francisco Chronicle;* Freedom Newspapers; The John P. Scripps Newspaper Group; Tribune Company; The Press Democrat; Santa Barbara News Press; Sparks Newspapers; McGraw-Hill, Inc.; The Sun Co.; Marin Independent Journal; Visalia Times-Delta; California Newspaper Publishers Association; California Freedom of Information Committee; The Radio and Television News Association of Southern California; California Society of Newspaper Editors; The East Bay Press Club; and Radio-Television News Directors Association NorCal.

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INTEREST OF AMICI

On July 6, 1982, a Riverside, California municipal court judge began hearing testimony in *People v. Diaz*.[1] Forty-one hearing days and some 4,000 pages of transcript

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[1]This case arises from the California Supreme Court decision *Press-Enterprise Co. v. Superior Court*, 37 Cal.3d 772, 691 P.2d 1026, 209 Cal.Rptr. 360 (1984); the underlying criminal case was *People v. Diaz*, Riv. No. 811120. To avoid confusion between the Court's decision, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), and the California decision, *Press-Enterprise Co. v. Superior Court*, 37 Cal.3d 772 (1984), that is the subject of this petition, Amici will refer to the California decision as *Diaz*. Pursuant to Rule 42, Amici file concurrently with this brief the parties' written consent.

later, he ordered Diaz to stand trial for murder. The preliminary hearing was conducted in secret.[2]

Diaz stood accused of an extraordinary number of unexplained deaths in several hospitals. The charges against Diaz cast a cloud over the whole community, many of whose members were patients or friends and relatives of patients in those hospitals. Yet, for months, no one in the community was allowed to know anything about the testimony against Diaz, about the quality of the investigation that led to the charges against him or about the mass of detailed autopsy and other evidence that unfolded in the preliminary hearing and which might have shed light on the quality of care in the affected hospitals.

Diaz' motion to exclude the public consisted solely of the following oral statement:

> At this time, after conferring with my client, I would like to exclude all press and prospective witnesses under 868 from the courtroom. I feel in the best interest of my client, and possibly because of the fact that this case eventually will be tried in the County of Riverside, that the press be excluded from the proceedings in this matter.

[2]At the close of testimony, the judge ordered the entire transcript sealed. It remained sealed until after Diaz waived his right to a jury trial more than a year after the preliminary hearing began.

Tr. Vol. I, p. 11.

The Court ruled:

> Therefore, I find that the motion should be granted to protect the Defendant's right to a fair trial, and impartial trial. Therefore, the media cannot be present nor can the public.

Tr. Vol. I, p. 12.

In ruling on a subsequent motion to unseal the transcript, the California Supreme Court countenanced the closure as a proper application of the legislative mandate that preliminary hearings remain open absent a finding that closure is "necessary" to protect the rights of the accused. In spite of the Court's *Richmond Newspapers, Globe Newspaper* and *Press-Enterprise* decisions,[3] the California court held that the press and public have no First Amendment right to attend preliminary hearings in any circumstances.

Amici regularly report on criminal proceedings throughout California. Their ability to report on preliminary hearings, however, has been seriously compromised by the *Diaz* decision. Blinded by an unfounded fear of publicity, the California court has eviscerated legislative attempts to establish meaningful access rights and disregarded the overwhelming weight of the Court's recent pronouncements on the issue of public access to judicial proceedings.

[3]*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984).

SUMMARY OF ARGUMENT

Diaz epitomizes the California court's sanction of closed hearings, adopted in *San Jose Mercury-News v. Municipal Court*, 30 Cal.3d 498, 506, 638 P.2d 655, 179 Cal.Rptr. 772 (1982).[4] Although the preliminary hearing is the trial or trial equivalent in most California criminal cases, the court's ruling ignores both the important social values served by exposing a critical stage of the criminal justice process to public scrutiny and the history of courtroom access. Secret preliminary hearings prevent the public from understanding why an accused must, or need not, stand trial. Secret hearings promote public ignorance and weaken public confidence in judicial decisions on constitutional issues including evidence suppression and police misconduct. Secret hearings threaten the quality of the procedure and stymie the natural catharsis that the criminal justice process promotes. In short, secret preliminary hearings undermine the values that the Court identified in *Richmond Newspapers, Globe Newspaper* and *Press-Enterprise*. Amici submit that the press and public will not have meaningful access to this unique and critical stage of California's criminal justice process unless the Court firmly establishes a public right of access arising out of the First Amendment.

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[4]Just six weeks after the *San Jose Mercury-News* decision, the California Legislature established a strict standard to protect the public's right of access to preliminary hearings. It amended Penal Code § 868 so that preliminary hearings may be closed to the public *only* when "necessary in order to protect the defendant's right to a fair and impartial trial . . ." Penal Code § 868 (operative March 1, 1982) (Deering 1983).

ARGUMENT

PRELIMINARY HEARINGS HAVE SUPPLANTED TRIALS AS THE PRIMARY JUDICIAL INSTRUMENT OF CALIFORNIA CRIMINAL JUSTICE.

Because of its unique evolution in California, the preliminary hearing predominates over other adjudicatory criminal proceedings — this one hearing is, in the majority of felony cases, the only time when evidence of guilt or innocence is ever considered; it is a mechanism for determining the legality of pretrial detention; it plays a significant role in plea bargaining and sentencing; it provides the detailed basis for the state's charges; and it is the primary forum for the adjudication of constitutional issues.[5]

The Preliminary Hearing Often Functions as the Trial.

In contemporary California criminal procedure, the preliminary hearing typically functions as the trial or trial equivalent[6], and the accused has the full panoply of

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[5]In California, a preliminary hearing is constitutionally mandated, even after grand jury indictment. *Hawkins v. Superior Court*, 22 Cal.3d 584, 586-87, 586 P.2d 916, 150 Cal.Rptr. 435 (1978). Historically, its primary function is to determine if evidence exists sufficient to bind the accused over for trial. Penal Code § 872 (Deering 1983). Its array of functions makes it "the most important procedural mechanism in the administration of justice." Graham and Letwin, The Preliminary Hearing in Los Angeles — Some Field Findings and Legal Policy Observations, 18 *U.C.L.A. L.Rev.* 636, 641.

[6]In practice, the preliminary hearing proceeds like a trial. California prosecutors present a substantially complete case and rarely hold back surprise witnesses for the trial. Graham and Letwin, 18 *U.C.L.A. L.Rev.* at 658. The length and complexity of preliminary hearings compares to trials. The *Diaz* hearing, for example, with 41 days of testimony and some 42 witnesses and more than 80 exhibits, fairly represent preliminary hearings in major cases. Defense counsel cross-examined every witness and, in addition to statutory evidence

procedural safeguards guaranteed at trial. The accused has a constitutional right to counsel (*Johnson v. Superior Court* (Mosk, J. concurring), 15 Cal.3d 248, 256, 539 P.2d 792, 124 Cal.Rptr. 32 (1975)); the right to cross-examine prosecution witnesses (*Hawkins v. Superior Court,* 22 Cal.3d 584, 589, 586 P.2d 916, 150 Cal.Rptr. 435 (1978)); the right to call defense witnesses[7] (*Jennings v. Superior Court,* 66 Cal.2d 867, 875, 880, 428 P.2d 304, 59 Cal.Rptr. 440 (1967)); the right to compel the cooperation of hostile witnesses (*Hawkins v. Superior Court,* 22 Cal.3d at 589); and the right to raise defenses and to elicit testimony regarding defenses. (*Jennings v. Superior Court,* 66 Cal.2d at 880). Rules of evidence apply (*Rogers v. Superior Court,* 46 Cal.2d 3, 8, 291 P.2d 929 (1955)) and evidence is taken in substantially the same fashion as at trial. The judicial determination must be based solely on the evidence presented and the magistrate is empowered specifically to weigh the evidence and determine the credibility of witnesses. *De Mond v. Superior Court,* 57 Cal.2d 340, 343-45, 368 P.2d 865, 19 Cal.Rptr. 313 (1962). Indeed, the magistrate's powers are, as a practical matter, coextensive with those of a trial judge, and "neither the superior court nor an appellate court may substitute its judgment" on credibility issues. *Id.* at 345.

The preliminary hearing is the trial in many cases. In some 75 percent of the criminal trials in Los Angeles

objections, raised issues of Sixth Amendment confrontation (Vol. XXVI, 2716-2717), Fifth Amendment self-incrimination (Vol. XXVII, 2767) and Fourth Amendment suppression (Vol. XVII, 1852).

[7]In *People v. Buckey,* L.A. No. A750900 (the McMartin Pre-School case), for example, the defense has just begun to present its case, which is estimated to last six months. The preliminary hearing has been going on for 16 months. Because of the ages of the children allegedly victims of the charged sexual abuse, the accuseds' rights to in-court confrontation was extensively litigated.

County in 1967, the entire preliminary hearing transcript was submitted in evidence and used in lieu of live testimony. Bureau of Criminal Statistics, CRIME AND DELINQUENCY IN CALIFORNIA, 106 (1968). In a substantial number of those cases, no other evidence was offered. Graham and Letwin, 18 *U.C.L.A. L.Rev.* at 931. Throughout California, a smaller but still significant number of cases are "tried on the transcript." In 1975 for example, 731 of 4,527 felony cases, approximately 16 percent, were tried by transcript. In each instance, the preliminary hearing , although characterized as a "pretrial" proceeding, was the trial.[8]

Even when a case is not "tried on the transcript," the preliminary hearing often is the only hearing the accused has before a judicial officer, and it functions as the practical equivalent of the trial. Generally, almost nine times as many felony complaint dispositions involve a preliminary hearing as involve a trial. From 1978 through 1981, fewer than nine percent of all California felony complaint dispositions involved a criminal trial.[9] In approximately half of the felony dispositions, the accused pled before the preliminary hearing. Of the half that resulted in a preliminary hearing, approximately 90 percent of the accuseds were bound over for trial; in the other 10 percent, charges were dismissed. Of the felony

[8]In a similar proceeding, the District Court for the Southern District of New York, on the application of the Associated Press and *Newsday,* held that the press had the right to attend the pretrial deposition of Joseph Bononno, Sr., taken to preserve his testimony, as if reporting the trial. *United States v. Salerno,* 11 Med.L.Rptr. 2248 (1985).

[9]These statistics come from the California Department of Justice, Bureau of Criminal Statistics. The years 1978 through 1981 were selected because the Bureau did not keep adequate statistics from which to draw meaningful conclusions before 1978 and after 1981.

cases in which the accused was bound over, some 90 percent were disposed of by plea bargain and never went to trial. California Department of Justice, Bureau of Criminal Statistics.

Recently available statistics present essentially the same picture. In 1984, approximately 98,000 felony complaints were filed and some 52,000 preliminary hearings were held. Fewer than eight percent of the cases were tried.[10]

These statistics demonstrate that in an overwhelming majority of cases the preliminary hearing is, as a practical matter, the trial or trial equivalent. The preliminary hearing is the principal focus of the California criminal justice process. It is the only opportunity for public scrutiny of the evidence underlying the criminal charge. It is the only opportunity the public has to see a judicial officer making decisions in a criminal case. Accordingly, without access to preliminary hearings, the chance for public review of the evidence on which a charge is based, or of the judicial decisions based on that evidence, is rare.

The Preliminary Hearing Determines the Legality of Detention.

The preliminary hearing is the primary test of the legality of pretrial detention. It gives the magistrate an opportunity carefully to examine the factual basis for the charge, thus allowing a more accurate assessment of the accused's eligibility for recognizance release or bail. Indeed, recognition of this interest accounted in part for the adoption of the preliminary hearing system in California. Graham and Letwin, 18 *U.C.L.A. L.Rev.* at 939; 1 Califor-

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[10]California Administrative Office of Courts, Municipal Court Report 1984.

nia Constitutional Convention, Debates and Proceedings 309 (1878).

The Preliminary Hearing Plays a Significant Role in Plea Bargaining and Sentencing.

Preliminary hearing evidence forms the basis for guilty pleas and sentencing. Since 90 percent of the cases heard result in pleas, the magistrate's decision sets the parameters of any plea bargain and plays a pivotal role in controlling prosecutorial "overcharging" by preventing unsupported charges from going forward. Graham and Letwin, 18 *U.C.L.A. L.Rev.* at 714.

The preliminary hearing evidence also provides the factual basis for any plea and subsequent sentencing. A court reviewing the appropriateness of a plea bargain must have the same factual support for its decision. *Santobello v. New York,* 404 U.S. 257, 261 (1971). The preliminary hearing transcript is often the only evidence available.

The Preliminary Hearing Provides the Only Detail of the State's Charges.

California permits non-specific criminal pleadings, *See, e.g.,* Cal. Penal Code §§ 949, 950 (Deering 1983). *Brown v. Superior Court,* 234 Cal.App.2d 628, 632-633, 44 Cal.Rptr. 519 (1965). Both the complaint, which is the basis of the magistrate's preliminary hearing jurisdiction, and the information, which is the basis of the felony prosecution, frequently do little more than cite the statutory basis for the offense charged and the date of the offense. Accordingly, preliminary hearing evidence provides the facts typically missing from formal pleadings and gives the accused and the public their only detailed notice of the state's charges.

The Preliminary Hearing is the Primary Forum for Constitutional Litigation.

The California preliminary hearing has evolved to serve as the most important forum for the adjudication of constitutional issues. In California, constitutional issues are decided at the preliminary hearing and, in most cases, nowhere else.[11] Issues routinely determined at preliminary hearings include: whether an in-court identification is tainted by an illegal lineup, *United States v. Wade,* 388 U.S. 218 (1967); whether a lineup violates due process requirements, *People v. Caruso,* 68 Cal.2d 183, 436 P.2d 336, 65 Cal.Rptr. 336 (1968); whether eye witness identification testimony is admissible, *People v. Malich,* 15 Cal.App.3d 253, 93 Cal.Rptr. 87 (1971) overruled on other grds., *People v. Medina,* 6 Cal.3d 484, 492 P.2d 686, 99 Cal.Rptr. 630 (1972); whether a defendant waived his right to counsel in interrogation, *Miranda v. Arizona,* 384 U.S. 436 (1966); whether a confession is admissible, *People v. Jimenez,* 21 Cal.3d 959, 580 P.2d 672, 147 Cal.Rptr. 172 (1978); whether a co-defendant's statement can be edited sufficiently to permit a joint trial, *People v. Aranda,* 63 Cal.2d 518, 407 P.2d 265, 47 Cal.Rptr. 353 (1965); whether the confrontation clause is satisfied, *Pointer v. Texas,* 280 U.S. 400 (1965) and other suppression questions including the admissibility of evidence allegedly seized in violation of Fourth Amendment requirements, Cal. Penal Code § 1538.5(f) (Deering 1982).

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[11] As a practical matter, the preliminary hearing is the first point in the California criminal justice process where such constitutional issues *can* be raised. The accused is motivated to raise them at the time because favorable determination may dispose of the case. Graham and Letwin's research suggests that the majority of cases terminated at the preliminary hearing or in related proceedings were dismissed because of constitutional defects. Graham and Letwin, 18 *U.C.L.A. L.Rev.* at 942.

THE PUBLIC POLICY REASONS SUPPORTING ACCESS TO TRIALS APPLY EQUALLY TO PRELIMINARY HEARINGS IN CALIFORNIA.

The Court has held repeatedly that the First Amendment has a "structural role to play in securing and fostering our republican system of self-government." *Richmond Newspapers, Inc.,* 448 U.S. at 587 (Brennan, J. concurring, emphasis omitted); *Globe Newspaper Co.,* 457 U.S. at 604. Implicit in this structural role is a guarantee of "indispensable conditions of meaningful communication" on matters of public interest. *Richmond Newspapers, Inc.,* 448 U.S. at 588. The First Amendment's structural role "serves to insure that the individual citizen can effectively participate and contribute to our republican system of self-government" by assuring that the individual citizen's discussion of governmental affairs is an informed one. *Globe Newspaper Co.,* 457 U.S. at 604-05.

The Court has identified four ways both the judicial process and society benefit from public attendance at criminal proceedings:

1. Public scrutiny improves the quality of the proceeding;

2. Public access increases public understanding of the criminal justice system;

3. Public access fosters public confidence in the system; and

4. Public access contributes to a fuller community catharsis.

Richmond Newspapers, Inc., 448 U.S. at 569-73; *Globe Newspaper Co.,* 457 U.S. at 606; *Press-Enterprise Co.,* 464 U.S. at 508-09.

Public access to preliminary hearings produces those very same benefits; indeed, because of the predominant

role of the preliminary hearing in California, without public access these benefits are lost.

Access Improves the Quality of the Proceeding.

Public access to preliminary hearings improves the functioning of the hearing itself. As with trials, public access helps assure that the proceedings are conducted fairly to all concerned. Access discourages perjury,[12] the misconduct of participants, and prevents decisions based on partiality. As the Court recognized, "[w]ithout publicity, all other checks are insufficient." *Richmond Newspapers, Inc.*, 448 U.S. at 569.

Access Increases Public Understanding.

Access to preliminary hearings increases public understanding of the criminal justice process. Because the preliminary hearing plays such a unique and broad role in California's criminal process, public access there is at least as important as access at trial. Without it, the public is robbed of the opportunity to understand the factual basis for the charges against an accused, the opportunity to see firsthand how the prosecutor's discretion is exercised, and the opportunity to observe the judicial officer's determinations. Furthermore, since such a significant number of preliminary hearings are in fact the trial, public understanding can only be served by allowing access to these "trials on the transcript." Denial of access

[12]The value of public scrutiny is illustrated by *Los Angeles Coliseum Commission v. N.F.L.*, C.D. Cal. No. 78-3523-HP, in which a member of the public came forward and identified a juror who had failed to disclose during *voir dire* an economic interest in the case. As a result of news reports, the juror's nondisclosure came to light. See newspaper articles in the appendices to the Petition for Reconsideration, *Oakland Alameda County, et al. v. United States District Court*, U.S. Court of Appeals for the Ninth Circuit, No. 82-7070, filed, March 3, 1982.

to the preliminary hearing when the transcript is the only evidence for trial is tantamount to holding a secret trial. Closed preliminary hearings in these circumstances not only prevent the public from understanding the peculiar function of a preliminary hearing, but also prevent understanding of it as a trial.

Access Increases Public Confidence.

Public access to preliminary hearings fosters public confidence in the criminal justice system, no less than public access to trials. Indeed, because of the broad range of critical issues, particularly constitutional issues, decided at preliminary hearings, and because the preliminary hearing is the only evidentiary hearing on the merits in the overwhelming number of cases, public access to such hearings may be more important to maintain public confidence in the criminal justice system than public access to trials.

The fact that, in California, the majority of constitutional issues are decided at the preliminary hearing underscores this point. If preliminary hearings are held behind closed doors, key decisions on important constitutional questions remain secret. The public has a right to see these safeguards applied in particular cases. Announced decisions after secret proceedings are insufficient to maintain public confidence in the criminal justice system. As the Court recognized:

> [T]he sure knowledge that *anyone* is free to attend gives assurances that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Press-Enterprise Co., 464 U.S. at 508 (emphasis in original).

Public access is also important to maintain public confidence in the fundamental decision made at the preliminary hearing: whether the state's evidence is sufficient to subject an accused to a full criminal trial. The public is entitled to know whether the facts of a particular case justify continued prosecution, and the substantial, related public expense.[13] The public cannot have confidence in decisions to prosecute or not if it is barred from the information upon which those decisions are based.

Public access is also critical to public confidence in California's criminal justice system because of the unique role preliminary hearings play in plea bargaining and sentencing. Public criticism of bargained pleas and sentences turns to cynicism if the public is deprived access to the hearings that provide the factual basis for such pleas and sentencing decisions.[14]

Access Contributes to Community Catharsis.

Finally, public access to preliminary hearings creates the same community catharsis that public access to trials promotes. As the Court said:

> When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for those understandable reactions and emotions. Proceedings held in secret

[13]In San Diego County, for example, it costs some $8,000 a day to run a courtroom, excluding state expense for prosecution and defense lawyers, 1982 Grand Jury Report. By this standard, the *Diaz* preliminary hearing cost the taxpayers $320,000. The public certainly has the right to see first hand how public funds are being spent.

[14]A November 23, 1985 NEXIS search of just newspapers and magazines produced 2,060 articles that discuss plea bargaining. For example, "What John Walker Really Bargained For", *The New York Times*, November 10, 1985; "Spies, What One Man Bargained For", *The Economist*, November 9, 1985.

> would deny this outlet and frustrate the broad public interest; by contrast, public proceedings indicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct. . . .

Press-Enterprise Co., 464 U.S. at 509.

Since most criminal cases in California never result in a public trial, public access to the preliminary hearing is important for its community therapeutic value. In most cases, the preliminary hearing is the only hearing at which evidence is taken and the underlying merits of the charge are considered. In the vast majority of cases, the public's only opportunity to know that "offenders are being brought to account for their criminal conduct," is at the preliminary hearing.

In short, all the structural values identified in *Richmond Newspapers*, *Globe Newspaper* and *Press-Enterprise*, apply with equal, if not greater, weight to preliminary hearings in California.

THE CALIFORNIA EXPERIENCE UNDERSCORES THE NEED FOR A CONSTITUTIONAL AFFIRMATION OF THE PUBLIC'S RIGHT OF ACCESS TO PRELIMINARY HEARINGS.

Diaz and Post-_Diaz_ Decisions Derogate the Public's First Amendment Access Rights.

By holding that a magistrate shall close a preliminary hearing merely on the conclusory statement that a "reasonable likelihood of substantial prejudice" exists, *Diaz* practically guarantees closed hearings. Instead of putting a substantial burden on the party seeking closure, as the Court has required in *Richmond Newspapers*, *Globe Newspaper* and *Press-Enterprise*, the California court has set a standard so relaxed that a magistrate's concern about

subsequent appellate criticism or the fear of post-trial reversal in light of *Diaz* makes closure commonplace.

Furthermore, *Diaz* specifically disregards other requirements of *Richmond Newspapers, Globe Newspaper* and *Press-Enterprise* that would stiffen *Diaz's* otherwise impotent "reasonable likelihood" standard. *Diaz* expressly holds that a defendant need not present evidence to justify closure and that a "factual finding of actual prejudice is not required." *Diaz,* 37 Cal.3d at 782, 691 P.2d 1026, 209 Cal.Rptr. 360 (1984). Further, *Diaz* does not require the magistrate to consider alternatives to closure or to consider whether closure will in fact be effective. Finally, *Diaz* does not even mention the rigorous requirement the Court imposed, reiterated in federal appellate decisions,[15] that the basis for any closure decision be articulated in findings.

Not surprisingly, *Diaz* has spawned appellate progeny equally offensive to the public's First Amendment rights. In *Telegram-Tribune, Inc. v. Municipal Court,* 166 Cal.App.3d 1072, 213 Cal.Rptr. 7 (1985), the court upheld a trial court order closing a preliminary hearing and carried the *Diaz* "secret hearing" policy one step further by closing the *argument* on the closure motion. The court also approved a two-step procedure; the accused need only state in "general terms and conclusions" the basis for the motion; and the court, if satisfied, then holds the closure motion behind closed doors. In short, the court

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[15]*See, e.g., Application of the Herald Co.,* 734 F.2d 93, 100-01 (2d Cir. 1984); *Associated Press v. U.S. Dist. Ct. for C.D. of Cal.,* 705 F.2d 1143, 1146 (9th Cir. 1983); *United States v. Chagra,* 701 F.2d 354, 361-65 (5th Cir. 1983); *United States v. Brooklier,* 685 F.2d 1162, 1169 (9th Cir. 1982); *United States v. Criden,* 675 F.2d 550, 560-61 (3d Cir. 1982).

sanctioned a procedure whereby the public is not even allowed to hear the basis for the court's closure decision.[16]

In *Tribune Newspapers West, Inc. v. Superior Court,* 172 Cal.App.3d 443, 218 Cal.Rptr. 505 (1985), the court construed a California statute which allows public access to juvenile proceedings "on the same basis as they may be admitted to trials in a court of criminal jurisdiction . . ." Welfare and Instit. Code, § 676(a). In deciding the public's right of access, the court held that the defendant need only establish the *Diaz* standard to justify closure of any such proceeding, trial or pretrial. *Id.* at 451. Accordingly, *Diaz* is being construed as a signal to lower appellate courts that even trials can be closed without evidence, findings, or the satisfaction of a meaningful burden.

Diaz and its progeny are being utilized increasingly at the trial court level.[17] For example, in *People v. Naddi,* S.D. No. F90410, a murder case, the accused moved to close both the preliminary hearing and the argument on that motion, citing *Telegram-Tribune.* The accused wanted to present live testimony to support closure and specifically moved to exclude lawyers representing the press

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[16]After *Telegram-Tribune,* the accused routinely moves for closed hearings on closure motions. *See, e.g.,* in San Diego, *People v. Lucas,* S.D. No. F89006; *People v. Naddi,* S.D. No. F90410; *People v. Troiani,* S.D. No. CRN9925.

[17]Since *Diaz,* closure motions have proliferated. For example, a partial list from California's three major metropolitan areas includes: *People v. Rogers,* S.F. No. 732798; *People v. Barr,* S.F. No. 740293; *People v. White,* S.F. No. 754937; (consolidated cases, motion denied but court reserved right to reconsider on certain witnesses); *People v. Troiani,* S.D. No. CRN9925 (motion granted); *People v. Ruby,* L.A. No. A909188 (motion denied); *People v. Miller,* L.A. No. A904176 (motion granted). The jury pools in San Francisco, San Diego and Los Angeles exceed a million persons.

during that testimony, thereby preventing any cross-examination. Before the court ruled on the motion, the accused himself withdrew his lawyers' motion.

In *People v. Lucas,* S.D. No. F89006, another murder case, the accused moved to close his arraignment using the *Diaz* standard. Under *Telegram-Tribune,* he also moved, successfully, to close the argument on the closure motion and the public was not even allowed to see the court's ruling that kept the arraignment open.

People v. Troiani, S.D. No. CRN9925, underscores *Diaz'* effect on trial courts' treatment of preliminary hearings. In *Troiani* a widow is charged with hiring five Marines to kill her Marine husband. Just before *Diaz* was published, on December 3, 1984, the press opposed defense closure motions and prevailed. When *Diaz* was published a few days later, the accused renewed their motions. The court considered closure on a witness by witness basis. The preliminary hearing lasted three and one-half months with 65 witnesses. The accused moved to close with virtually each witness' testimony. No evidence of a prejudice was offered, except for news clippings. Press attorneys appeared again and again opposing closure at a cost of thousands of dollars in legal fees. The court closed the hearing for approximately 50 witnesses.

A more recent and bizarre example is *People v. Prairie Chicken*, S.D. C 53092, in which Blaine Prairie Chicken is charged with biting a police officer's arm in a laundromat scuffle. Prairie Chicken then claimed that he has AIDS. The state joined in the accused's closure motion. The state's justification for closure was protection of the police officer's sensibilities; the accused's rationale was pretrial publicity. The court, acknowledging that the accused had produced no evidence of fair trial prejudice but apparently more concerned about a police officer's potential embarrassment than public access, closed the November 21, 1985 preliminary hearing and sealed the transcript.

Amici submit that, absent a reversal of *Diaz,* the California courts will continue to abuse the public's First Amendment right of access to criminal proceedings and encroach on the Court's clear mandate that such proceedings be open.

The California Closure Provision Is an Historical Aberration.

Not only does *Diaz* ignore the Court's decisions on public access but the very history of the preliminary hearing in California underscores that it is an historical anomaly. The closure provision, Penal Code section 868, came into being with California's 1851 wholesale adoption of the Field Code of Criminal Procedure, largely as a result of the legislative influence of David Dudley Field's brother, Stephen J.[18] For 131 years, until its 1982 amendment, section 868 gave the accused the unilateral right to close the courtroom.[19] The closure provision is an aberration precisely because it was included in the Field Code as a result of personal animus, because it was not enforced until recently and because it is at odds with the English and American tradition of open preliminary hearings.

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[18]Geis, Preliminary Hearings and the Press, 8 *U.C.L.A. L.Rev.* 397, 410 (1961). Stephen J. Field later became a Supreme Court Justice. He figures prominently in the tangled and tawdry history of early San Francisco. See *Cunningham v. Neagle,* 135 U.S. 1 (1890) and Milton S. Gould, *A Cast of Hawks* (1985).

[19]New York, Field's own state, did not adopt his code until 1881. N.Y. Laws of 1881, c. 442, § 203. Seven years later, the provision mandating closure was made discretionary. N.Y. Laws of 1888, c. 220, § 1.

Professor Geis characterizes this closure provision as "an historical oddity,"[20] born of Field's personal antipathy toward the press.[21]

> It appears likely that the impetus for the original proposal for closed preliminary hearings was provided by Field's personal antipathy toward newspapers, an antipathy that he characteristically expressed with fiery vehemence in one of his essays. "There is something radically, flagrantly wrong in the conduct of most newspapers in the United States," Field wrote, inasmuch as "the right of reputation . . . is habitually violated." Jefferson, Field noted, had considered the press of his day "putrid" but "it has since become putrescence putrified." The action of newspapers in their reporting of a recent trial was compared by Field to that of "cormorants over a carcass."[22]

In addition, available evidence suggests that the closure provision was neither invoked nor enforced in California for more than 100 years. The first reported case upholding the provision was decided in 1959. *People v. Blanco,* 170 Cal.App.2d 758, 339 P.2d 906 (1959).[23]

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[20]Geis, 8 *U.C.L.A. L.Rev.* at 413n.8.

[21]*Id.* at 408.

[22]*Id.* at 408-09.

[23]Elsewhere, the Field Code provision appears to have had little impact on open preliminary hearings. In the other states that adopted it (Arizona, Idaho, Montana, New York, Nevada, North Dakota and Utah), it was apparently only rarely invoked, and those cases appear to have involved proceedings that would have been held *in camera* in any event. Geis, 8 *U.C.L.A. L.Rev.* at 409; *see also* Fenner and Koley, *Access to Judicial Proceedings: To Richmond Newspapers and Beyond,* 16 Harv. C.R. - C.L.L.Rev. 415, 434 (1981).

Finally, *Diaz* to the contrary, the tradition of open court preliminary hearings is rooted in English and American common law heritage. Although originally the preliminary hearing was a secret, inquisitorial affair,[24] 18th and 19th century reforms fundamentally changed its nature and purpose; it took on the attributes of a judicial proceeding and public access became the norm. *See,* Pollock, *The Expansion of the Common Law,* 31 (1904).[25] The brief amici curiae of the national news organizations filed in this case contains a scholarly discussion of these historical precedents which Amici adopt.

The *Diaz* Assumptions Are Incorrect.

The *Diaz* justification for closed preliminary hearings is that the publicity surrounding open hearings irreparably prejudices the jury pool and prevents the accused from obtaining trial by an impartial jury. The court's assumptions, without factual support, are fundamentally incorrect. Pretrial publicity does not necessarily result in an unfair trial; alternatives to closure are effective; and

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[24]1 Stephen, *History of the Criminal Law of England,* 225 (1983); Kauper, *Judicial Examination of the Accused — A Remedy for the Third Degree,* 30 Mich.L.Rev. 1224, 1235 (1932).

[25]In the United States, as in England, preliminary hearings came to be regarded as public affairs with the advent of the judicial inquiry type proceeding. Geis, 8 *U.C.L.A. L.Rev.* at 401. The prescriptions of the 16th century English statutes, which were incorporated in early American colonial law, fell into gradual disuse in the 18th and 19th centuries. Kauper, *Judicial Examination of the Accused — A Remedy for the Third Degree,* 30 Mich.L.Rev. 1[illegible]4, 1236 (1932). By 1851, the transition from the inquisitorial to the judicial proceeding was complete. Kauper at 1236-37. Significantly, there was no American counterpart to the 1848 English law provision allowing discretionary closure of preliminary hearings (11 & 12 Vic. c. 42, § 19) and the general practice was to hold the preliminary hearing open to the public and media. Geis, 8 *U.C.L.A. L.Rev.* at 407.

closure does not work. The brief amici curiae of national news organizations addresses these points at length and Amici adopt that argument without extended elaboration.

One post-*Diaz* experience underscores the error of the California court's assumptions. In a highly publicized San Diego case, *People v. Lucas,* S.D. No. F89006, the accused, at a taxpayer cost of some $2,500, commissioned a poll to establish that the potential jury pool was prejudiced. The accused was in his second preliminary hearing in six months. The first dealt with his alleged murder of a 22-year-old University of San Diego student. *People v. Lucas,* S.D. No. F87587. Even before Lucas was apprehended, the victim's disappearance and the facts surrounding her subsequently discovered murder were highly publicized. After the first preliminary hearing, which after initial closure[26] was opened to the public, Lucas was charged with three additional murders; they were the subject of the second preliminary hearing. To close the second hearing, Lucas submitted more than one hundred newspaper articles and his poll. The poll purported to show that 89 percent of San Diego County was aware of him or the charges against him in the first preliminary hearing and that some 57 percent was aware of him or the charges against him in the second preliminary hearing. Lucas' pollster admitted under cross-examination, however, that, in spite of extensive public knowledge of Lucas and his cases, at least 48 percent of persons polled would be perfectly adequate, fair and impartial jurors. Since the San Diego jury pool is approxi-

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[26]This closure hearing adds further insight into the effect of *Diaz.* The accused admitted he had no evidence of prejudice to support his motion — not even news clippings. Whereupon the court, acknowledging that the accused had the burden, took judicial notice of unspecified "publicity" and closed the hearing. *People v. Lucas.* S.D. No. F87587.

mately one and a half million persons, by the pollster's own testimony there is a pool of at least 750,000 fair and impartial potential jurors. This post-*Diaz* experience is another example that pretrial publicity is not what the California court assumes it to be.

THE COURT'S PRIOR DECISIONS SET AN APPROPRIATE STANDARD TO GUARANTEE THE PUBLIC'S RIGHT OF ACCESS TO PRELIMINARY HEARINGS.

The Court has established substantive and procedural standards to determine when a criminal adjudicatory proceeding may be closed consistent with the First Amendment.

First, a hearing at which the opponents of closure may present arguments must precede any contemplated closure. *Globe Newspaper Co.,* 457 U.S. at 609 n. 25.

Second, "[w]here . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co.,* 457 U.S. at 606-07. Otherwise phrased, the interest in closing the proceeding to the public must be "overriding." *Press-Enterprise,* 464 U.S. at 510.

Third, the justification for closure must be based on evidence and articulated in specific findings. *Richmond Newspapers, Inc.,* 448 U.S. at 581.

Fourth, the burden to establish the basis for closure is on the party seeking it. *Press-Enterprise Co.,* 464 U.S. at 510.[27]

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[27]In the Sixth Amendment context, the Court has, in *Waller v. Georgia,* ____ U.S. ____, 104 S.Ct. 2210 (1984), drawn on *Richmond Newspapers, Globe Newspaper,* and *Press-Enterprise,* to articulate a

A standard that is the logical outgrowth of the Court's articulations in *Richmond Newspapers, Globe Newspaper,* and *Press-Enterprise* has been adopted in substantially the same form by federal appellate and state courts. In *Associated Press v. U.S. Dist. Ct. for C.D. of Cal.,* 705 F.2d 1143 (9th Cir. 1983) (the *DeLorean* case), the court held that "a party seeking closure of proceedings or sealing of documents [must] establish that the procedure 'is strictly and inescapably necessary in order to protect the fair trial guarantee.' " *Id.* at 1145. Continuing, the court said:

> To meet this burden and justify abrogating the first amendment right of access, it is necessary to satisfy three separate substantive tests . . .
>
> First, there must be "a substantial probability that irreparable damage to [a defendant's] fair-trial right will result" if [the proceeding is not closed] . . .
>
> Second, there must be "a substantial probability that alternatives to closure will not protect adequately [the] right to a fair trial." [Citation.] In other words, there must be no less drastic alternatives available . . .
>
> Third, there must be "a substantial probability that closure will be effective in protecting against the perceived harm."

Id. at 1145-46.

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standard for determining when a suppression hearing can be closed over an accused's objection. The Court held:

> Under *Press Enterprise*, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

104 S.Ct. at 2216.

That standard, in substance but with different articulation, has been applied by a number of federal appellate courts. *Application of the Herald Co.,* 734 F.2d 93, 100-01 (2d Cir. 1984); *In re Globe Newspaper Co.,* 729 F.2d 47, 56-57 (1st Cir. 1984); *In re Greensboro News Co.,* 727 F.2d 1320, 1325 (4th Cir. 1984); *United States v. Chagra,* 701 F.2d 354, 365 (5th Cir. 1983); *United States v. Brooklier,* 685 F.2d 1162, 1169 (9th Cir. 1982); *United States v. Criden,* 675 F.2d 550, 560-561 (3d Cir. 1982).

Numerous state courts have adopted a substantially similar standard. *See, e.g., Star Journal Publishing Corp. v. County of Pueblo County,* 197 Colo. 234, 237, 591 P.2d 1028 (1979) (clear and present danger); *Miami Herald v. Lewis,* 426 S.2d 1 (Fla. 1982) (necessary); *Iowa Freedom of Information Council v. Wifvat,* 328 N.W.2d 920 (Iowa 1983) (substantial probability of irreparable damage); *Ashland Publishing Company v. Asbury,* 612 S.W.2d 749 (Ky.App. 1980) (substantial probability of irreparable damage); *Journal Newspapers, Inc. v. Maryland,* 54 Md.App. 98, 456 A.2d 963 (1983), aff'd, *Buzbee v. Journal Newspapers, Inc.,* 297 Md. 68, 465 A.2d 426 (strict and inescapably necessary).

These articulations are consistent with the strict test adopted by the American Bar Association. The ABA Standards Relating to the Administration of Criminal Justice Section 8-3.2 (2d Ed. 1980) state that closure is permissible only upon a finding that: "(i) the dissemination of the information from the hearing would pose a clear and present danger to the fairness of the trial and (ii) the prejudicial effect of such information on the jurors cannot be avoided by any reasonable alternative means." The ABA standards were adopted as a result of experience that the "substantial likelihood" standard failed effectively to protect the public's right of access to preliminary hearings. Amici submit that the Court should

adopt the tripartite tests as articulated by the Ninth Circuit in *Associated Press* to secure both the public's right of access and the accused's right to a fair trial.

CONCLUSION

Three times since 1980, the Court has held that the press and public have a right, arising out of the First Amendment, to attend criminal judicial proceedings and has articulated procedural requirements to prevent impermissible closure. Twice since 1982, the California Supreme Court has ignored the Court's decisions. Amici respectfully request that the Court reverse the *Diaz* decision and affirm the right of press and public to attend preliminary hearings.

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Respectfully submitted,

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APPENDIX

APPENDIX A

Description of Amici

1. The Copley Press, Inc. publishes five daily newspapers in California — *The San Diego Union, The Tribune, The Daily Breeze, News-Pilot* and *Evening Outlook* — whose combined circulation is nearly one-half million copies daily, as well as six daily newspapers in Illinois, and operates a national news service.

Harold W. Fuson, Jr.
Vice President and General Counsel
The Copley Press, Inc.
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La Jolla, CA 92037
Attorney for The Copley Press, Inc.

2. The Associated Press is a membership nonprofit corporation organized under the laws of the State of New York. It is a news wire service with the primary purpose of gathering, editing and transmitting news reports and photographs to its 1,300 member newspapers and its 5,700 member broadcast stations throughout the United States, and to other publishers throughout the world.

Rogers & Wells
Richard N. Winfield
200 Park Avenue
New York, NY 10166
Attorneys for The Associated Press

3. *Los Angeles Times,* a division of The Times Mirror Company, is the largest daily newspaper in California, and has a general daily circulation of more than one million copies.

William A. Niese
Jeffrey S. Klein
Times Mirror Square
Los Angeles, CA 90053
Attorneys for *Los Angeles Times,*
a division of The Times Mirror Company

4. National Broadcasting Company, Inc. (NBC) provides programming, including news, for broadcast by owned and affiliated television stations throughout the country. NBC's news department continually covers pretrial and trial proceedings in criminal cases in California and elsewhere.

Donald L. Zachary
Tracy S. Rich
Robert G. Mendez
3000 West Alameda Avenue
Burbank, CA 91523
Attorneys for National Broadcasting Company,
Inc. (NBC)

5. McClatchy Newspapers is a communications company with seven daily and three nondaily newspapers in California, Washington and Alaska, having a total circulation in excess of 500,000.

Gary B. Pruitt
McClatchy Newspapers
2100 Q Street
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Attorney for McClatchy Newspapers

6. *San Francisco Chronicle,* a division of The Chronicle Publishing Co., is a newspaper with a daily circulation of 540,000 and a Sunday circulation of 705,625. The Chronicle Broadcasting Co., a wholly owned subsidiary of Chronicle Publishing Co., operates three television stations.

Cooper, White & Cooper
Mark L. Tuft
44 Montgomery Street, Suite 3300
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Attorneys for The Chronicle Publishing Co.

7. The John P. Scripps Newspaper Group is an affiliation of locally independent newspapers in California.

Harrison & Watson
Robert Robinson
530 B Street, Suite 2201
San Diego, CA 92101
Attorneys for The John P. Scripps Newspaper
Group

8. Freedom Newspapers publishes the *Orange County Register* in California and many other newspapers throughout the United States.

9. Tribune Company publishes the *Daily News* in Los Angeles, the *Peninsula Times-Tribune* in Palo Alto and the *Times-Advocate* in Escondido, California, as well as the *Chicago Tribune, New York Daily News* and other daily newspapers. It also owns a number of major independent radio and television stations.

Lawrence Gunnels
Vice President and General Counsel
Tribune Company
435 North Michigan Avenue
Chicago, IL 60611
Attorney for Tribune Company

10. *The Press Democrat* in Santa Rosa and the *Santa Barbara News-Press* are published in California by The New York Times Co., which also publishes *The New York Times* and a number of daily newspapers in other states.

Katharine P. Darrow
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The New York Times Company
229 West 43rd Street
New York, NY 10036
Attorney for The New York Times Co.

11. Sparks Newspapers publishes various daily and weekly newspapers in California, including *The Daily Review, The Argus, The Tri-Valley Herald,* and *The San Ramon Valley Herald.*

12. McGraw-Hill, Inc. has a number of news bureaus in California which gather news for a variety of national publications. Its wholly owned subsidiary, McGraw-Hill Broadcasting Co., Inc., operates two California television stations, KGTV in San Diego and KERO-TV in Bakersfield.

Robert N. Landes
Barbara E. Schlain
Kenneth M. Vittor
McGraw-Hill, Inc.
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Attorneys for McGraw-Hill, Inc.

13. *The Sun* is published by The Sun Co. throughout San Bernardino County, California, with a total circulation of 80,000 daily. It is a Gannett newspaper.

Reid & Hellyer
Robert J. Bierschbach
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San Bernardino, CA 92412
Attorneys for The Sun Co.

14. *Marin Independent Journal* is a daily newspaper serving Marin and southern Sonoma Counties in California. It is a Gannett newspaper.

15. *Visalia Times-Delta* is a daily newspaper serving Tulare and eastern Kings Counties, California. It is a Gannett newspaper.

16. The California Newspaper Publishers Association, a nonprofit mutual benefit association, comprises a membership of a majority of the state's daily and weekly newspapers of general circulation.

Michael B. Dorais
Terry Francke
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Attorneys for California Newspaper Publishers Association

17. California Freedom of Information Committee is a nonprofit organization representing the journalism profession of California. Its membership consists of working press, both print and broadcast, educators, press clubs, chapters of the Society of Professional Journalists — Sigma Delta Chi, the California Newspaper Publishers Association, and the California Broadcasters Association. Among its purposes is to protect, on behalf of the public, against all efforts to impose restraints

against the flow of information to which the public is entitled.

Kotler & Kotler
Jonathan Kotler
15910 Ventura Boulevard
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Encino, CA 91436
Attorneys for California Freedom of Information Committee

18. The Radio & Television News Association of Southern California is an organization of radio and television professionals whose members regularly cover criminal proceedings in California.

19. The California Society of Newspaper Editors is a professional society of newspaper editors organized to promote professional excellence and dedicated to upholding the First Amendment rights of their members.

20. The East Bay Press Club is an organization of journalists and editors who brought the first constitutional challenge to California Penal Code Section 686's closure provisions.

21. Radio-Television News Directors Association NorCal is a nonprofit organization representing news directors in Northern California broadcast media.

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